IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 665 OF 2000

1. Ronkysingh Bahadursing Rathod.
2. Raisingh Bahadursingh Rathod.
3. Yashpalsingh Bahadursingh Rathod.

All residing at Behind Mangal Kirana Stores, Sambhaji Chowk, Ulhasnagar, Dist. Thane ..Appellant (Orig. Accused Nos.1 to 3).

V/s

1. The State of Maharashtra.
2. Mrs. Satwant Kaur Rathod, R/o Sector No.25, Behind Kalani Building, Ulhasnagar -4, Dist. Thane. ..Respondents

Shri A.P. Mundargi for the appellantss.
Shri D.S. Mahispurkar,A.P.P. for the State.

CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.

DATE : 29 TH SEPTEMBER, 2004.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

1. The family property dispute resulted into the death of Mangalsingh. The appellants No. 1 to 3, the nephews were charged for the same offence punishable under Section 302 r/w section 34 of Indian Penal Code, The Additional Sessions Judge, Kalyan, by the impugned judgment dated 30/8/2000 convicted all the appellans-accused and sentenced to suffer imprisonment

for life and to pay fine of Rs. 20,000/- each and in default of payment of fine they should suffer rigorous imprisonment for three years. It is also ordered that out of the total amount of the fine, Rs.50,000/- be paid to Smt. Satwantkaur, the widow of deceased Mangalsingh Rathod by way of compensation. Therefore, this appeal against the order of conviction.

2. The complainant P.W. 8, Babisingh Rathod has three brothers. Bahadursingh, deceased Mangalsingh and Balvantsingh. They resides in the same loacality. Babisingh resides in the adjoining flat. Mangalsingh, "the deceased" was residing in the adjoining flat. Bahadursingh, with has six sons resides behind Mangal Kirana Stores, Shivaji Chowk, Ulahsnagar, District Thane. The appellants 1 to 3, are the three sons of Bahadursingh, reside with him. All these family members are dealing in the business of plumbing and building material.

3. On 1/6/1998 at about 9.30 p.m. the deceased Mangalsingh received a telephonic information from the sister, Mrs. Moni Kaur from Ajmer, Rathasthan, that Ramsingh the son-in-law of Bahadursingh, constructing a

house on the land jointly owned by Mangalsingh, Bahadursing and Babysingh. Balvantsingh also conveyed the same message to the complainant, Babysingh. The deceased, after receipt of the aforesaid information, went to the house of Bahadursingh at about 9 to 9.30 p.m. As per the complainant, the incident occurred between 9.15 to 10.15 on 1.6.1998. The quarrel between Mangalsingh and Bahadursingh sparked. They were quarrelling and scuffling. The deceased touched and put his hand over the turban of Bahadursing. The accused No.1 Ronkysingh went inside his house and returned with Sura (knife), the accused No.2 Raising and accused No.3 Yashpalsing caught hold of Mangalsingh. Accused No.1 thereafter, assaulted Mangalsingh with the said Sura and inflicted injuries over stomach and chest. Mangalsingh managed to run away from the house from that place towards his motor-bike, parked at Mangal Kirana Stores. The accused Nos. 1 to 3 chased Mangalsingh. Accused, again in a lane stabbed Mangalsingh on his back. Accused No.2 and 3 caught hold Mangalsingh and accused No.1, again, stabbed Mangalsingh over his stomach. Mangalsingh collapsed and accused ran towards the direction of Sambhaji Chowk. At about 10.15 p.m. Master Bipiyasingh, aged 16 years son of Bahadursingh

informed to Babysingh that Mangalsingh met with an accident and has taken to the Government Hospital. The complainant therefore, sent Balvantsingh and his maternal nephew Master Kisansingh to the said Government Hospital. They in turn informed to the complainant on the phone that Mangalsingh succumbed to the stabbed injuries. The complainant therefore, went to the hospital and saw the dead body of Mangalsingh with multiple injuries. The complainant therefore went to the house of Bahadursingh. The complainant also noticed blood marks from the main road to the house of Bahadursingh. The accused No.1 to 3 were not noticed by the complainant at the house. The complainant suspected that the appellant Nos. 1 to 3 killed Mangalsingh, as they were not found in the house.

4. On 2nd June, 1998, at about 1.05 p.m. the complainant lodged a complaint, which was registered as Cr.No.I-56/1998 for the offence punishable under Section 302 of Indian Penal Code. Mr. Mane (P.W. 19) directed to P.S.I. Mr. Kharche to proceed to Central Hospital and to draw the inquest panchanama (Exh.18) of the dead body of the Mangalsingh. It was accordingly, drawn and dead body was sent for autopsy. One P.I. Mane (P.W.19)

also drawn a panchanama of the scene vide Exh.49 at the house of Bahadursingh and the place where the deceased was collapsed. The blood stains ofthe various spots were collected. The photographs of the articles (P2 to P4) were also taken including of the place of occurrence. There is open space between the houses of sons of Bahadur Singh and house of Bahadursingh. The motor bike was parked at the Mamta Kirana Stores, only shop on the main road.

5. The I.O. has recorded the statements of the witnesses on 2/6/1998, and around 3 p.m. arrested all the three accused. The blood stained clothes of the accused Nos. 1 to 3 were seized under panchanama 37. The body of the deceased was sent to post-mortem. The clothes of the deceased were also sent vide memo Exh.20. The documents related to the landed property of the complainant and his brother at Ajmer were also collected. I.O.has recorded statements of 13 witnesses on that day.

6. The statements under Section 161 of Code of Criminal Procedure were also recorded on 3/6/1998, of one Sunil Kadam and Babysing. The complainant reported,

that, they were the eye witnesses to the offence. However, hiding out of fear. The statements of the sisters, who came from Ajmer were also recorded on 4/6/1998. On 5/6/1998, at the instance of Ronkysingh knife was discovered in presence of panchas i.e. Exh.41. The said knife was found under a stone near Durgamata Mandir Shiv Mandir. Exh.42, the statement of one Hiralal from whom VCR was brought by accused No.1 to view the marriage video cassettes recorded, at the relevant time of the incident. The C.A. report is at Exh.21.

7. Accused has denied the charges framed against them. The trial commenced further. The prosecution has examined in all 19 witnesses. No defence witness was examined by the accused. The learned Sessions Judge by the impugned judgment and order held that on 1/6/1998, at about 22-00 to 22.15 hours at night. The accused Nos. 1 to 3, firstly at their house near Shivaji Chowk, Ulhasnagar and secondly in front of Mamta Kirana stores in furtherance of their common intention committed the murder of deceased Mangalsingh Rathod.

8. We have heard the learned Advocate for the

appellants and the learned A.P.P. for the State and with their assistance re-weighed and re-examined the total record including the evidence of the witnesses. The contentions raised by the appellants, oral, as well as, in their memo of appeal against the impugned judgment are taken note of, including the counter submissions of the A.P.P.in favour of the judgment.

9. We have noted that P.W.1 Manic Rase, P.W.2, Smt.Sindhu, P.W. 3 Suma Chaturvedi, P.W. 4 Sureshchander, P.W. 5 Rekha Jadhav, P.W. 7 Ajitsingh, all neighbours alleged to be the eye witnesses declared hostile. We have gone through their testimony as recorded. Even otherwise the balance testimony of those witnesses nowhere supports the case of prosecution. P.W. 6 Vasist Pande was also declared hostile.

10. The basis of prosecution therefore, revolve around the alleged two eye witnesses namely Babusingh and Sunil Kadam, P.W. 9 and P.W. 13. We have noted from the records that these so called eye witnesses gave their statements on 3/6/1998, at about 4.30 p.m. The alleged incident took place on 1/6/1998, between 9.15 p.m. to 10.15 p.m. When they saw the complainant on

3/6/1998, at about 4. p.m. on the road, they got down and informed to the complainant, that they had witnessed the murder of the deceased. Thereafter, the complainant along with these two witnesses, on autorickshaw, went to the police station and the police accordingly, recorded their statement. There was no proper explanation and or believable explanation extracted on the record from these two alleged eye witnesses and the reason for not informing the police about the witnessed incident. These two witnesses, in spite of their close and good relations with the deceased Mangalsingh, failed to inform or communicate to the complainant or relatives of the deceased, about the incident immediately. There is no sufficient explanation given by these two witnesess for not informing to the complainant or his family, only because of apprehension or fear. There are no material extracted on the record to support that these two witnesses were present at the time of incident, at the place of occurrence along with the family members of appellants in the house in question. The prosecution has failed to link the presence of these two witnesses at the relevant time. The explanation and or justification given by these two witnesses of non informing and or not giving any intimation to the

complainant and its family members or to the police definitely creates a doubt and a suspicion.

11. It appears that these two witnesses are got up witnesses. It was expected from them that, if these witnesses are known to the deceased and complainant being their relatives, they ought to have on telephone or otherwise communicated to the family of the complaint or any such person immediately after the incident. Their explanation that after the incident they also ran away after the accused, who were chasing the deceased not acceptable. Thereafter instead of coming back to the place and or house they went to Ulhasnagar Station. They boarded on local train within 5 minutes. and went to Kalyan. At 10.30 they got down from Train at Kalyan. It is very clear that no attempts were made by these witnesses to call or communicate to the deceased's family. The reason was given that they did not have the telephone number, in spite of the knowledge that the deceased had telephone since more than 12 years. They further deposed that on 2/6/1998, till 12 midnight they were at Kalyan Platform or on a road at Kalyan. It is not believable that they have no other source of the communication to inform the incident to the deceased

family.

12. As per their testimony at about 1 a.m. they reached home, they left till 4 p.m. on 2nd June, 1998. There is no further explanation what they were doing thereafter, till 4 p.m. on 3/6/1998. Both these witnesses were standing on 3/6/1998, in the Balcony and at about 4 p.m., they saw the complainant on the road and informed the complainant about the incident. The justification that they had no food till 4 p.m. and they were frightened leads no way. The prosecution failed to place on the record any supporting witness about the presence of P.W. 9 and P.W. 13 at Kalyan platform, on 1/6/1998, till midnight of 2/6/1998.

13. Even if, we consider the case of prosecution that these witness were frightened and therefore, could not inform the deceased’s family or to the police, still their presence, at the relevant time on the scene, was not proved. The visit of complainant at the place, where these two witnesses were standing on 3/6/1998 at 4 p.m. is also raises doubt. These two witnesses and late recording of their statements as by P.W. 13 also raises a doubt. These two eye witnesses appears to be

after thought and got up witnesses, whose statements were recorded after more than two days from the date of incident in question.

14. When the complaint was lodged there was no such case, made out even by the complainant about the presence of these two witnesses on the scene of occurrence or even in that area. The other witnesses as recorded above from, P.W. 1 to P.W.7 also not supported the presence of these two witnesses.

15, If these two witnesses are dislinked from the prosecution story, according to us there is no circumstantial evidence or connecting evidence to justify and or backed the story of the prosecution and or of the complainant. The panchanama of these two witnesses even otherwise difficult to believe as P.W. 13 Sunil has deposed that accused No.1 at 4 p.m. on 1/6/1998, invited them to view the cassettes of his marriage. There is no such cassette seized or found on record in the panchanama. They were watching cassettes when the deceased entered and discussed with Bahadursingh about the construction at Ajmer which resulted into a scuffle and appellants and basically

accused No.1 assaulted deceased with knife.

16. Sunil P.W. 13, stated that he was residing with deceased Mangalsingh, since he was aged 7 to 8 years. They further deposed that they did not inform to anybody, that they were going to view the video cassettes at the house of accused No.1. They also deposed that they did not intervene in the quarrel. They just got up and stood aside and witnessed the incident. There was no Chaous in the house when the deceased was stabbed. They further deposed that 20 to 25 peoples were gathered near on the spot where deceased collapsed. They did not raise any alarm for help. No efforts were made by them to find out the police at railway station. This testimony according to us therefore, raises various doubts about their presence, as well as, their claim of having witnessed the incident.

17. The other eye witnesses, whose statements was not recorded and who was working with Babysingh the complaint P.W.8. These witnesses again mechanically supported the story of P.W. 13. This witnesses even though identify the knife deposed further that the

police did not show knife along with other weapons. He further deposed that on 1/6/1998 at about 7 p.m. he was in the shop of complainant. He also deposed that at about 7 P.M. after the information received of the offence the complainant ran from the lane (verify). These witnesses deposed that the rickshaws were available at Lalchowk only but as there were police they did not board the same. They did not purchase any tickets, at railway station, nobody checked their tickets, they spent entire night on platform.They admitted that railway police were patrolling at Kalyan Railway Station. He admits further thaton 3/9/1998 the statement was recorded of P.W. 13 only and not of the complainant. The conviction cannot be based or maintained on the basis of testimony of these two witnesses.

18. The testimony of these two witnesses demonstrate that they used to reside in upper floor of the building in which the deceased Mangalsingh had his shop. One witness Sunil P.W. 13 used to reside with Mangalsingh. The another witness also knows Mangalsingh as the deceased Mangalsingh brought him by the said Sunil used to have his regular food at the house of Mangalsingh.

It is also deposed that the said Sunil is still residing in the house of said Mangalsingh. Therefore, it is unbelievable that in spite of their thick relations with the deceased Mangalsingh they kept silence of said incident and as frightened, could not speak to anybody. These two friends are admittedly working with the complainant. In this background it is difficult to rely upon the evidence of such persons. According to us, these witnesses are unreliable. Their conduct is full of blemish. The presence of these two friends at the relevant time in the house in question raises various doubts. There is nothing to corroborate their presence at the spot at the relevant time except the mechanically adopted statements of these two witnesses.

19. The complainant P.W. 8 had not wintessed the incident. The other alleged eye witnesses as recorded above, declared hostile. Therefore, the allegations and suspicion by the complainant against the appellants were not backed by any other supporting or corroborative evidence. In absence of any eye witness to this incident, and or in the present case no other witnesses supported the prosecution case as complained, it is difficult to maintain the conviction based on this

complaint of P.W. 8 Babysingh. It is difficult to overlook the property dispute as alleged and relations between these two families. There is nothing to justify that how this Babysingh and under what circumstances was present on 3/6/1998, at about 4 p.m. near the place where P.W.9 and P.W. 13 were standing in their balcony. The complainant at the time of lodging the complaint no where mentioned about P.W.9 and P.W. 13. Prosecution therefore, failed to prove the incident, as well as, the complaint as lodged by the complainant for want of sufficient and material circumstances to link the accused with these alleged conviction.

20. There is no further reason or explanation made out by the complainant that why the incident was recorded or reported at 1 a.m. He had knowledge of the incident as the deceased was hospitalised. and therefore, had visited the said hospital. He also admitted that P.W. 9 and P.W. 13 worked in his shop and that he pays them salary even though P.W. 9 has denied the same. He also answered in cross-examination that P.W. 9 and 13 were absconding after the incident. There is nothing brought on the record through P.W. 9 and P.W.13, that they were together, At the relevant

time of the incident till they met complainant on 3/6/1998, at 4 p.m. These witnesses P.w.9 and P.W. 13 who were as admitted were working with this complainant. Therefore, appears to be got up witnesses, who are brought on record after tutering them and or for supporting the complainant to settle their personal grievance against the family of Bahadursingh and or police. The medical evidence of P.W. 18 even though supported the injuries unable to explain at what time the body was received. In the cross-examinationhe states that body was received at 2 a.m. In examination in chief he says that the body received at 3.30 a.m.

21. There is no plausible explanation given to the effect that why they had collected two bottles of blood of the deceased. No purpose was explained why the police wanted to collect the blood like this Panchanma of articles Exh.20 also reflects that two bottles of bloods were collected. The inquest panchanmaa shows, near the dead body Bahadulrsingh Rathod was there.

22. The panch witness, Yogesh, deposed that there was no blood stains spots in the house of Bahadursingh or in a lane or in front of Mangal General Stores. P.W.

16 Sunil also stated that the spot panchanama was already prepared by the police. The same was not read over to him or explained to him. He also stated that he had not seen blood spots on the stone tiles or in lamppost in the courtyard of house of Bahadursingh. Devidas P.W. 11 also unable to state from whom the said Sura was recovered, and where is Shivmandir. This witness also unable to identify the Sura. Sura (knife) was recovered at the instance of accused No.1 Exh.41. But P.W. 12 Shamsundar unable to identify the accused on whose instance the knife was recovered. He also unable to identify the knife as weapon.

23. Photographer P.W. 17, Densi, unable to recollect that the police had made only marking inside the house and that no photo snaps was taken in the lane in question. In the cross-examination he was contradicted to say that he had snapped photographs in the house. However, in cross-examination he denies the same.

24. Balvantsingh P.W. 10, the brother of the deceased whose statement was recorded on 2/6/1998, deposed that since these three accused were not present

in the hospital, where Bahadur Singh, Bodhasingh were present and therefore, accused were suspected by him also. He stated that when he went to the house of Bahadursingh from hospital and saw the blood from opening of lane till the house of Bahadursing. He stated that he talked with deceased Mangalsingh for 2 to 3 minutes before he left Babysingh.

25. P.W.14 Naunikaur the sister of deceased unable to tell even the number on which she had called. She also unable to explain on which date the statement was recorded.

26. The police witness P.W. 19 Vishnu Mane deposed that no enquiry was made who brought the body to the hospital and accordingly no statement was recorded in the hospital for the same. He was unable to remember the name of the witnesses whose statements were recorded. He was unable to recollect the exact time of visit to the scene of occurrence. No panchanama was drawn as visited in the night. No guard was appointed to guard entire scene of the offence. In scene panchanama 4 spots are mentioned but blood stains marked from house till the motorcycle. He also deposed that no

blood stains found in the house of Bahadursingh. He was uanble to support the present of stone tiles. There was no specific mark of photographs to identify the place of the stabbing. The marriage cassette of Ronky was not seen. He also admits the collection of the two blood bottles during the autopsy. There were no marks of the time of in snapping photos in front of the house. Not sure of any lane, from approaching the house of accused No.1.

27. The learned Advocate has relied on A.I.R. 2002 Supreme Court 3164 (Bodh Raj Alias Bodha and others Vs. State of Jammu and Kashmir). The guiding principles of the circumstantial evidence as laid down by the Apex Court are recorded in following terms,

> "(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

28. We have gone through even the evidence of hostile witnesses from P.W. 1 to P.W. 7 and P.W. 15 and P.W. 16. The prosecution unable to extract any link to support their case even from their cross-examination. There is nothing in the testimony of the witnesses who were declared hostile, to support the prosecution case on any aspect which includes the date, time and place and scene of offence in question. Therefore, this also dis-linked the evidence led by the prosecution. No other witnesses from the public or passengers who were standing at the relevant time near the body of the deceased were examined as witness. Therefore, even if there is a death, it is difficult in the facts and circumstances of the present case to connect the role as alleged to be played by the appellant No.1 and or by appellants 2 and 3, individually or collectively.

29. After considering the above principles, as well as, the prosecution material on the record and in view of the reasoning given above, we are unable to accept the reasoning given by the Sessions Judge in the matter. According to us, conviction based on the above witnesses and evidence is unsustainable.

30. There is merit in the appeal. The i.mpurgned judgment and order dated 30th August, 2000, quashed and set aside. The appellants are acquitted and directed to be released, unless required for other offence. However, the amount of fine, if paid to the wife of the deceased need not be refunded by her. Appeal is allowed as above.

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]